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July 29, 2016

VIA CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

Sheila Desai
Remedial Project Manager
Superfund Division
US Environmental Protection Agency,
Region 5
77 West Jackson Boulevard
Chicago, IL 60604-3590

Re: Blue Tee Corp.'s Response to Notice of Respondent Noncompliance
Old American Zinc Plant (OAZ) Superfund Site
ASAOC for RD #V-W-14-C-011

Dear Ms. Desai:

This responds to your letter dated July 8, 2016 to Blue Tee Corp. c/o Ms. Jennifer Mumper, Manager-Environmental, Gold Fields Mining, LLC, at Peabody Energy's Peabody Plaza address at 701 Market Street, St. Louis, Missouri, concerning an August 1, 2014 Remedial Design (RD) Administrative Settlement Agreement and Order on Consent (ASAOC) for the Old American Zinc (OAZ) plant in Fairmont City, Illinois (the Site).

As we are certain you are aware, although the ASAOC was signed on behalf of Blue Tee, Blue Tee is not currently and never has been the entity performing, or in control of the performance of, environmental response action work for the OAZ site. As demonstrated by the addressee used for your July 7 letter, as well as the entity identified as the author or submitter of the various reports and deliverables noted there, Gold Fields Mining, LLC (Gold Fields) (and through it, its parent company Peabody Energy Corporation (Peabody)) is and always has been the party implementing environmental cleanup activities associated with the OAZ site.

We have no direct information about the Final Design Report or the monthly Progress Reports identified as overdue in your letter, or the correspondence and comments exchanged between Gold Fields and EPA concerning the Final Design Report, or any change in Gold Fields' Project Coordinator or contractors. Despite repeated requests and demands, Gold Fields and Peabody are not communicating substantively with Blue Tee about the OAZ site or any of the other sites around the country which have been Peabody/Gold Fields' environmental responsibility over the past decades.

The principal information we have about the intentions of Peabody/Gold Fields concerning the OAZ site comes from activity in the *Blue Tee Corp. v. Xtra Intermodal Inc.* private contribution action over current and past owner/operator allocation shares at the Site, which currently is pending in the



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U.S.D.C for the Southern District of Illinois (Cause No. 3:13-cv-00830), and which has been litigated by Peabody/Gold Fields in Blue Tee's name. At the initiative of Peabody/Gold Fields, the parties (including the General Services Administration (GSA) as a past operator party) sought and were granted a 90 day stay of proceedings, to and through September 29, 2016. The expectation identified by the parties is that within this time frame, Peabody and Gold Fields will complete an "evaluation" of "their rights and obligations with respect to their environmental liabilities, including the liabilities at issue in this matter." See the attached Exhibit 1, 6/27/16 *Plaintiff Gold Fields Mining LLC's Consent Motion for Ninety Day Stay of Proceedings* and the Court's docket entry of 6/27/16 granting the request.

We hope and expect that by the end of September, Peabody/Gold Fields will have completed their evaluations and decided what they intend to do about the OAZ Site. Accordingly, we respectfully request that EPA forebear from any proceedings against Blue Tee concerning the OAZ Site until at least that date.

The remainder of this letter provides further information about why and how Blue Tee finds itself in its current, uncomfortable, position, and why it would be most appropriate for EPA to pursue Peabody and Gold Fields rather than Blue Tee for implementation of response work at the OAZ site, both within the Peabody/Gold Fields bankruptcy action and otherwise, in the event Peabody and Gold Fields ultimately attempt to shirk their environmental responsibilities concerning the site.

BACKGROUND

It is important to begin any discussion about Blue Tee Corp. with certain fundamental facts.

- Blue Tee Corp. was not created until 1985.
- Blue Tee Corp. at no time owned or operated the American Zinc Company's mining or smelting facilities or businesses.
- Although Blue Tee Corp. represents the corporate entity which had once borne the American Zinc Company name, upon Blue Tee Corp.'s creation, the company once known as American Zinc Company no longer held any mining or smelting assets or operations, nor did it hold the corporate dollars reserved to address the environmental consequences of those operations.
- As an integral part of Blue Tee Corp.'s creation, Gold Fields American Corporation (GFAC) – then the parent of the entity from which Blue Tee Corp. was created – committed unequivocally to indemnify, defend, and hold harmless Blue Tee Corp. from any and all environmental liabilities associated with the mining operations which had been conducted by American Zinc Company. This commitment was necessary and sensible, because Blue Tee Corp. did not acquire the income stream or assets associated with those operations, had never been and was never involved in them, and had no resources to address their environmental consequences.



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- Based on this absolute commitment from GFAC (also later known as Global Energy Finance LLC (GEF)), and behaviors consistent with that commitment from Peabody and Gold Fields, Blue Tee Corp. never has managed, performed, or paid for environmental investigation or remediation activities at any sites or facilities formerly associated with the American Zinc Company.
- To the extent that Blue Tee Corp. has signed administrative or judicial settlement documents addressing the environmental consequences of American Zinc Company's former operations, Blue Tee Corp. did so solely as a straw party at the insistence of GFAC/GEF, Peabody, or Gold Fields, and with the expectation (honored from 1985 to and through Peabody/Gold Field's bankruptcy filing in April, 2016), that one or more of those parties, or their predecessors or successors, would manage, perform, and pay for such work.
- Although Blue Tee Corp. represents the corporate entity that once bore the name American Zinc Company, Blue Tee is not and never has been the successor to American Zinc for purposes of liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund). Blue Tee did not own or operate the American Zinc facilities which produced environmental contamination, nor did Blue Tee transport, store, treat, dispose, or arrange for the disposal of hazardous substances associated with those facilities. Blue Tee did not and does not have monies or assets derived from the operation of those facilities. Other corporate entities, unrelated to Blue Tee Corp., have acknowledged and accepted responsibility for the environmental consequences of American Zinc Company's former operations, and should continue to be held responsible for those liabilities.

With these fundamental facts in mind, the next sections of this letter provide additional details about how and why we can assert these fundamental facts.

Blue Tee Corp.'s Formation in 1985 and GFAC's Indemnity

Blue Tee Corp. (Blue Tee) is an employee-owned company formerly engaged in businesses relating to steel distribution, ferrous scrap, and various types of equipment. Blue Tee traces its roots to 1985, when a management group at Gold Fields American Industries, Inc. (GFAI), a successor to American Zinc Company – which for many years was involved in the zinc mining and smelting business – purchased certain non-mining assets and operations of GFAI in a leveraged buyout. GFAI was a subsidiary of Gold Fields American Corporation (GFAC) at the time of the leveraged buyout. As part of the buyout transaction, a newly formed corporation, Blue Tee Acquisition Corp., was merged into GFAI, with GFAI being the surviving corporation. The name of the combined entities then was changed to Blue Tee Corp.

At the time Blue Tee was formed in 1985, all of the relevant parties (GFAC, GFAI, and Blue Tee Acquisition Corp.) recognized that there could be environmental liabilities arising out of the historic mining and smelting operations of American Zinc Company and its corporate predecessors.



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Because the assets and operations of Blue Tee Corp. from and after its inception in 1985 had no connection of any kind to the former American Zinc Company's mining activities, GFAC and GFAL agreed that Blue Tee should be fully and completely protected against liabilities arising from the mining operations of GFAL and its predecessors. Indeed, Blue Tee's financial lender in the leveraged buyout, Citibank, required that Blue Tee receive this type of unqualified indemnification as a precondition to financing.

Consistent with these terms and acknowledgements, the 1985 Reorganization Agreement among GFAC, GFAL and Blue Tee Acquisition Corp. (the document which created Blue Tee Corp.) contains an unequivocal agreement by GFAC to indemnify Blue Tee. More specifically, Section 7.1.3 of the Reorganization Agreement states that GFAC agrees "to indemnify, defend and hold harmless [Blue Tee] from and against all Losses based upon, arising out of or otherwise in respect of any Environmental Claims" Section 6 of the Reorganization Agreement defines an "Environmental Claim" to mean "any claim based upon, arising out of or otherwise in respect of historical mining operations of GFAL and the Subsidiaries."

Between 1986 and 1998, various environmental claims against Blue Tee arose, Blue Tee tendered those claims to GFAC, and GFAC assumed all responsibility for handling and paying those claims pursuant to its indemnity obligations.

1998 Transaction Involving Peabody Energy

As of early 1998, GFAC – by then known as Global Energy Finance LLC (GEF) – was part of a group of companies owned, directly or indirectly, by The Energy Group PLC (TEG). In 1998, TEG sold and transferred certain of its assets and liabilities to a company now known as Peabody Energy Corporation (Peabody). The assets and liabilities so transferred included not only TEG's coal assets, but also the obligations of TEG's subsidiary, GEF (formerly GFAC), to indemnify and defend Blue Tee against environmental liabilities. Accordingly, as part of this 1998 transaction Peabody took on the responsibility for indemnifying and defending Blue Tee with respect to environmental liabilities. Indeed, not only did Peabody's obligations extend to indemnifying and defending Blue Tee, Peabody also agreed to assume responsibility for handling the indemnified liabilities in the first instance and, as addressed below, received the benefit of a multi-million dollar reserve established to handle those liabilities.

GEF/GFAC was not the only corporation Peabody acquired as part of the 1998 transaction. The TEG acquisition also brought another TEG subsidiary, Gold Fields, into Peabody's corporate family. Gold Fields was and remains the corporate successor to Tri-State Zinc Co., and Tri-State Zinc Co./Gold Fields had and has its own environmental liabilities associated with former mining and smelting operations. From 1998 to the present, Peabody has used Gold Fields to manage both the environmental liabilities associated with Tri-State Zinc Co. and the environmental indemnity obligations owed to Blue Tee.



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Peabody did not agree to indemnify Blue Tee and, indeed, assume full responsibility for handling the American Zinc environmental liabilities in the first instance, without receiving anything in return. Rather, Peabody received significant benefits from the 1998 transaction in return for this assumption of responsibility. Presumably, the purchase price of the assets Peabody acquired from TEG reflected Peabody's assumption of the environmental liabilities of both Blue Tee and Gold Fields. Further, prior to the 1998 transaction, a financial reserve had been established on GEF's books to cover environmental liabilities. As part of the 1998 transaction, that reserve – more than \$60 million – was transferred from GEF to Peabody and/or Gold Fields.

Finally, GFAC long had taken the position that it had rights under any available insurance policies which provided coverage for the Blue Tee environmental liability claims as a consequence of its 1985 agreement to indemnify and defend Blue Tee against such liabilities. In 1989, GFAC and Gold Fields filed suit in New York state court against various insurance companies, asserting that they were entitled to coverage under policies issued by the defendant insurers to various insureds, and seeking coverage for environmental liabilities related to Blue Tee and Gold Fields (the New York Insurance Litigation).

In 1993 (five years prior to the 1998 transaction that brought Peabody into the mix), at GFAC's request, GFAC and Blue Tee entered into an Understanding and Agreement concerning various insurance policies. GFAC requested this as an accommodation from Blue Tee, and with the express intent of using any available insurance proceeds to help defray the costs of addressing the environmental liabilities relating to the Blue Tee indemnity. Although GFAC had agreed to indemnify and defend Blue Tee against such liabilities as part of the 1985 transaction which created Blue Tee, no assignment of insurance rights had occurred as of 1993. GFAC believed that, as the party responsible for paying the environmental costs, it was entitled to receive the benefits of any environmental insurance.

The New York Insurance Litigation went on for many years and remained pending at the time of the 1998 transaction involving TEG and Peabody. In early 1998, the plaintiffs in the New York Insurance Litigation reached a settlement with one of the defendant insurers, USF&G, which generated proceeds payable to the plaintiffs of \$4.25 million. Those monies ultimately were given over to, or inured to the benefit of, Peabody and/or Gold Fields as a result of Peabody's agreement to assume responsibility for the environmental liabilities which had been the subject of the settled insurance coverage claims.

Between 1998 and 2000, several more settlements were reached with insurance company defendants in the New York Insurance Litigation. The aggregate settlement proceeds from those settlements, including the USF&G settlement, were approximately \$10 million. All or most of those settlement proceeds ultimately were paid to, or inured to the benefit of, Peabody and Gold Fields.



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We believe that potential insurance coverage under a few policies issued by Cigna (later ACE Group, now part of Chubb) remains unresolved, and further information about this set of policies is provided below in the current status section of this letter.

Delaware Litigation

Between 1998 and mid-2007, Peabody and Gold Fields continued to assume and exercise sole responsibility for dealing with the Blue Tee environmental liabilities and did not raise any issues with Blue Tee concerning their obligations to do so. In mid-2007, however, that changed, and Peabody and Gold Fields began disputing the scope of their responsibility for environmental liabilities asserted against Blue Tee.

This dispute led to litigation in Delaware state court among Peabody, Gold Fields, Blue Tee, and GEF under the case name *Global Energy Finance LLC v. Peabody Energy Corporation*, C.A. No. 08C-10-129 RRC (Del. Super. Ct., New Castle County) (the Delaware Action). In 2010, the Court in the Delaware Action entered summary judgment in favor of Blue Tee, holding that Peabody and Gold Fields are required to indemnify and defend Blue Tee with respect to the environmental liabilities. *Global Energy Finance LLC v. Peabody Energy Corporation*, 2010 WL 4056164 (Del. Super. 2010) (copy attached as Exhibit 2).

Based on the Delaware Action's summary judgment ruling, Blue Tee, Peabody and Gold Fields entered into a Supplemental Indemnification Agreement dated March 16, 2011 (the SIA) (copy attached as Exhibit 3), in which the parties reiterated and reaffirmed Peabody's and Gold Fields' obligations to indemnify and defend Blue Tee with respect to environmental liabilities. Notably, the SIA provided not only that Peabody and Gold Fields would indemnify and defend Blue Tee, but that they would manage and pay for the environmental liabilities in the first instance. See SIA, ¶¶ 7-9. The SIA also provided that Peabody's and Gold Fields' obligations to manage and pay for Blue Tee's environmental liabilities, and their obligations to indemnify and defend Blue Tee in that regard, would not be released, discharged or affected by any bankruptcy proceedings. *Id.* at ¶ 9(c).

During the pendency of the Delaware Action and following the entry of summary judgment and execution of the SIA, Peabody and Gold Fields continued to accept and exercise sole responsibility for managing and paying for the Blue Tee environmental liabilities, and otherwise indemnifying and defending Blue Tee in that regard. Peabody and Gold Fields continued to do so at least up until the time of their filing for bankruptcy in April, 2016.

In sum, for the past more than 30 years, Blue Tee has wholly relied on Peabody and Gold Fields, or their predecessors, to manage and pay for environmental liabilities, and indemnify and defend Blue Tee in that regard.



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CURRENT STATUS OF MATTERS

First, and as noted at the beginning of this response, Peabody and Gold Fields have continued to take the position, with respect to environmental liabilities relating to Blue Tee in general, that they are continuing to evaluate and sort out how they propose to deal with those liabilities, that they need more time in which to do so, and that they have not made a decision about proceeding or not proceeding in any manner regarding those liabilities. Therefore, as of today we still do not know whether Peabody and Gold Fields intend to seek to wash their hands of those liabilities, or to acknowledge reality and proceed to respond to those liabilities as the successor for purposes of CERCLA to American Zinc Company.

Second, on June 17, 2016, Blue Tee received a CERCLA Section 104(e) Request for Information from EPA's Office of Enforcement and Compliance Assurance (the HQ 104(e) Request) (copy attached as Exhibit 4). The HQ 104(e) Request indicates a preference on the part of the EPA to deal with Blue Tee's environmental matters on a comprehensive, rather than piecemeal, basis. Blue Tee began its response to the HQ 104(e) by correspondence dated July 18, 2016, and will continue that response in September. The materials provided thus far are voluminous, but we would be happy to provide you with a computer disk copy of them upon request.

We note that part of the information we provided in response to the HQ 104(e) Request indicated that Blue Tee has been in a wind-up phase over the past few years and does not currently have any operating businesses. While Blue Tee is not without assets, they are limited. If Peabody/Gold Fields ultimately does not continue to take responsibility for the environmental liabilities and Blue Tee is compelled in some manner to do so, Blue Tee may be able to address the environmental remediation needs of some sites, but will not be able to fund the entire spectrum of present and potential future environmental claims, which have been estimated at tens of millions to hundreds of millions of dollars.

Third, as indicated above, we understand that some facets of the New York Insurance Litigation are still pending, and that there are a few insurance policies that may provide coverage for Blue Tee environmental liabilities, although coverage issues under those policies have not been settled or resolved. While those policies were assigned to GFAC (and then to Peabody/Gold Fields) in connection with the 1993 Understanding and Agreement described above, Blue Tee has informed everyone concerned that it has a claim to these insurance benefits if Peabody/Gold Fields reneges on its environmental responsibilities to Blue Tee. On June 16, 2016 and again on July 26, 2016, we sent correspondence to ACE Group's counsel putting them on notice of Blue Tee's position, and tendering to ACE Group certain matters, including all responsibilities concerning the OAZ Site. A copy of these letters is attached at Exhibit 5.



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PROPOSED COURSE OF ACTION

In light of all of the foregoing, we respectfully request and propose that further proceedings in this matter be held in abeyance for a period of 60 days. As explained above, a number of things will be unfolding within that time frame which hopefully will bring some clarity as to how this matter may be addressed.

- Peabody/Gold Fields will be further evaluating how it plans to proceed with respect to the environmental liabilities relating to Blue Tee, and hopefully will come to, and communicate, decisions in that regard.
- Blue Tee will be pursuing available insurance coverage for the OAZ Site and other matters.
- Blue Tee will continue its response to the HQ 104(e) Request, which may lead to further consideration and discussions concerning how to deal with all matters at issue on a comprehensive, rather than piecemeal, basis.

If you have any questions concerning any of the above or wish to discuss any aspect of these materials, please let me know. And thank you in advance for your cooperation concerning this matter.

Very truly yours,

Kathleen M. Whitby

Enclosures

Cc via email: T. Faye, Esq.
D. Einik, Esq.
G. Greiman, Esq.